

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 01 June 2016

Public Authority: Department of Health

Address: 79 Whitehall

London

SW1A 2NS

Decision (including any steps ordered)

1. The complainant has requested minutes and the name of attendees at a particular meeting between Jeremy Hunt and the Royal College of Surgeons (RCS). The DoH stated no minutes were held but considered the names of attendees should be withheld on the basis of section 35(1)(d) of the FOIA or section 40(2) for a limited number of the attendees.
2. The Commissioner's decision is that although the section 35(1)(d) exemption is engaged the public interest favours disclosure. The Commissioner does accept that section 40(2) has been correctly applied to withhold the names of two individuals that the DoH has specified.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the names of the attendees at the meeting with the exception of the names of the two individuals the DoH has correctly applied section 40(2) to withhold.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 17 August 2015, the complainant wrote to the Department of Health (DoH) and requested information in the following terms:

"Your documents state that Jeremy Hunt met with the RCS in May 2015 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/412707/Q1_2014_Ministerial_gifts_hospitality_travel_and_external_meetings_April_to_June_-_final.pdf May I see who was present and the minutes of this meeting please?"

6. The DoH responded on 25 August 2015 and stated it held some information relevant to the request but did not hold any minutes of the meeting. For information relating to the Secretary of State's diary the DoH considered this to be exempt on the basis of section 35(1)(d).
7. Following an internal review the DoH wrote to the complainant on 23 October 2015 and maintained its position that any details on attendees were exempt from disclosure on the basis of section 35(1)(d) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 31 October 2015 to complain about the way his request for information had been handled.
9. The Commissioner established with the DoH that the withheld information in this case was contained in a diary entry and as the request was for who was present and the minutes, the only information the Commissioner is considering is the names of the individuals that were listed in the diary entry.
10. During the course of the Commissioner's investigation the DoH also sought to rely on section 40(2) to withhold this information. Therefore the scope of the Commissioner's investigation is to determine if the DoH has correctly withheld the attendees of the meeting on the basis of either section 35(1)(d) or section 40(2) of the FOIA.

Reasons for decision

Section 35(1)(d) - operation of any Ministerial private office

11. Section 35 provides that:

"Information held by a government department ... is exempt information if it relates to –

(d) the operation of any Ministerial private office"

12. The DoH argues that the information in this case engages section 35(1)(d) as it relates to administrative matters within Minister's private offices, namely the working patterns of Ministers and the set-up of their diary.
13. The Commissioner accepts that section 35(1)(d) is applicable in this case as the diary relates to the operation of a Ministerial private office. He has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosure

14. The DoH recognises there is a general public interest in disclosure of information that increases openness in Government and may increase public trust in, and engagement with, the Government.
15. The DoH acknowledges there is a public interest in understanding how ministerial private offices operate but argues that this would not be met by disclosure as it would not add anything to the public knowledge in terms of the way in which private office are run or administrated.
16. The complainant argues that Ministers and public officials should not be allowed protected space and does not see how disclosure of the information would prohibit the efficient and effective carrying out of ministerial business.
17. The complainant also argues that there is no evidence that the experienced officials including politicians and civil servants involved in the meetings would have been given or sought any assurance as to confidentiality. The severity of the prejudice in terms of the effect on individuals must therefore be fairly minimal.

Public interest arguments in favour of maintaining the exemption

18. The DoH argues that disclosure would prejudice the effective running of a ministerial private office and it is important that ministerial private office are free to make arrangements for the minister's diary to facilitate the most efficient and effective carrying out of ministerial business.
19. The DoH further argues that ministers must be able to rely on these arrangements and must be confident these staff members remain independent and do not allow extraneous considerations such as presentational concerns or possible perception of diary arrangements to affect their judgement in administering the private office. There is

therefore a strong public interest in ensuring there is a protected space around ministers to ensure good decision-making is supported.

Balance of the public interest arguments

20. In reaching a decision the Commissioner has drawn heavily on an earlier decision notice¹ and subsequent decision of the Information Tribunal² in which the issue of the disclosure of ministerial diary entries was considered. In the Tribunal case the diary entries contained more than just lists of names in some cases and yet both the Commissioner and the Tribunal concluded that the public interest favoured disclosure for a large number of the diary entries.
21. The Tribunal found at paragraph 85 of its decision that:

"the diary entries could not be guaranteed to give an exhaustive picture of who had access ... but we consider it to be clear that the diary entries would have provided worthwhile additional information on the topic of external access"
22. The Commissioner considers this to be an important point that carries considerable weight here. The DoH does publish lists, by month, of gifts, hospitality and travel for Ministers (which is where the complainant learned of the meeting which is the subject of this request). This does include a one line description of meetings attended by the Minister. However, this published list does not include any further details of the meeting. Disclosure of the relevant diary entries would give more of an insight into the meetings as the make-up of the attendees may reveal how high level the discussion are and there is a clear public interest in getting a better understanding of external access to Ministers.
23. The Tribunal also recognised that disclosure would have a high impact on the contribution to the public understanding of how the Minister spent his time and how government works. The Commissioner accepts this was in relation to diary entries sometimes containing more than just a list of attendees and dates and times but that regardless these arguments still carry weight here. Disclosure would contribute to public understanding of how government works as it would show the level of the meetings attended by the Minister by revealing details of the attendees.

¹ ICO decision notice FS50406024 https://ico.org.uk/media/action-weve-taken/decision-notice/2013/812324/fs_50406024.pdf

² EA/2013/0087

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1237/Department%20of%20Health%20EA.2013.0087%20\(17.03.14\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1237/Department%20of%20Health%20EA.2013.0087%20(17.03.14).pdf)

24. The DoH's main arguments against disclosure relate to the prejudice to the effective running of the ministerial private office and the fact that Ministers must be confident staff members are independent and do not allow external considerations to affect their judgement in administering the private office. The DoH goes on to argue there is a need for a protected safe space to ensure good decision making is supported.
25. The Commissioner considered some of these points in his previous decision notice and found in that case that whilst there is a public interest in ensuring ministerial offices are efficiently run the DoH had not demonstrated how the disclosure of the specific information would impact on this. The Commissioner finds similarly in this case, the DoH has not argued how disclosing the attendees at the meeting would have any impact on the running of the office and the Commissioner cannot realistically see how the stated prejudice would occur. As such he has given little weight to this argument.
26. The DoH's point regarding having confidence in staff members to administer the office is not particularly coherent. The Tribunal had considered the issue of external scrutiny in the context of the public reading into the diary entries and it found that there was *"some limited substance in the concern about disclosure possibly fuelling speculation about relations between Ministers, or between Ministers and senior officials ... we accept that in some cases ... this could be a distraction from more useful work. Speculation is frequent in any event, and we consider that concern is a modest factor."*
27. The situation is slightly different here as the meeting in question is between a Minister and members of an outside body but the main point is still the same. Disclosure of any information from the diary entry may lead to speculation, even if it is only a list of attendees, as it may result in speculation as to the nature of the meeting based on the people involved and to the relationships between the organisations. But, as the Tribunal found, this concern is limited at most and is clearly outweighed by the benefits and public interest in transparency.
28. The Tribunal had also accepted the Commissioner's view that the diary entries gave no detail about discussions or objectives so it was not satisfied that the information required protection for the preservation of substantive safe space. The Tribunal highlighted the fact that press speculation and public speculation about the views of Ministers happens frequently and the diary entries revealed little on the matter of policy, the fact a meeting existed even when the topic of the discussions is known, does not reveal anything about the decision and view of the Minister.

29. In this case disclosing the attendees from the diary entry would also not reveal anything about the Minister's view or affect any decisions he may be making with regard to policies. The Commissioner feels it prudent to emphasise that the information in question here is simply a list of attendees at the meeting. Although this information comes from the diary entry it is essentially a list of names and the Commissioner cannot accept that disclosing this information would impact on the protected space needed by Ministers as it would not show anything about the discussions in the meeting or any conclusions reached. For this reason, the Commissioner gives this argument little weight.
30. The Commissioner does not therefore attribute any substantial weight to the arguments provided by the DoH in favour of maintaining the exemption. In this case, as there is a presumption in favour of disclosure and the arguments for releasing the information are more well evidenced, the Commissioner has concluded the public interest in favour of maintaining the section 35(1)(d) exemption does not outweigh the public interest in disclosure.
31. However, the DoH has applied section 40(2) to withhold some of the names that make up the list of attendees so the Commissioner has now gone on to consider the use of this exemption.

Section 40(2) - third party personal data

32. Section 40(2) FOIA provides an exemption for information which is the personal data of any individual, other than the requester, where disclosure of that personal data would be in breach of any of the data protection principles.
33. In this case, the DoH only considers this exemption applicable to names of certain attendees at the meeting that it has identified to the Commissioner. These are more junior members of staff either at the public authority or at the RCS. The DoH has therefore applied section 40(2) to the names of two individuals.
34. Personal data is defined in section 1(1) of the Data Protection Act 1998 (DPA) as :

"data which relate to a living individual who can be identified –

(a) from those data,"
35. In this case as the information is the names of individuals it is clear that this information constitutes personal data for the purposes of section 1(1) of the DPA.

36. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of the FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) – where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle. This states that *“personal data shall be processed fairly and lawfully”*.

Likely expectations of the data subject

37. The Commissioner notes the DoH has provided very limited arguments to support its position but as this relates to personal data he has a duty to consider the use of this exemption and any arguments he believes may be relevant.
38. The Commissioner considers that more junior officials and less senior members of other bodies, such as the RCS, would not have had any reasonable expectation their names and presence at these meetings would be disclosed into the public domain. The Commissioner cannot be certain but it is likely that more junior individuals are less likely to be in public roles so would have a lesser expectation of their names being disclosed. The Commissioner is also aware that it is not just the disclosure of the names that is this the issue in this case, it will also reveal that the individual took part in the meeting which is the subject of this request and this may lead to scrutiny the individual concerned would have had no reasonable expectation of.

Would disclosure cause damage or distress to the data subjects?

39. The Commissioner considers it can be difficult to quantify what damage and distress may be caused but in any event it is only necessary to show that there is a possibility of this happening. For much the same reasons as above, the Commissioner acknowledges there is a possibility of the individuals concerned being distressed by the disclosure of their names and the fact they were involved in the meeting. More senior officials in public facing roles would be aware that they have a lesser expectation of privacy but for more junior members of staff this is not the case. However, the information does relate to the work life of the individuals and not their private life so this does diminish the argument.
40. That being said the Commissioner cannot discount the possibility of this information causing some distress to the individuals involved in a meeting between Jeremy Hunt and a body representing medical professionals as it would lead to speculation about the roles of these individuals in the meeting and the nature of the meeting.

The legitimate public interest

41. The Commissioner considers that whilst there is some legitimate public interest in understanding how Ministers organise their time it is not clear how disclosing the names of attendees at the meeting would meet this legitimate public interest.
42. Taking into account the data subjects' likely expectations and the possibility of distress, as disclosure of the information withheld under section 40(2) would not to any great extent meet the legitimate public interest in this case, the Commissioner considers the exemption has been correctly applied in relation to the two names the DoH has identified in the diary entry.
43. As the Commissioner has upheld the section 40(2) exemption to withhold two of the names of the attendees at the meeting but does not accept the section 35(1)(d) exemption provides a basis for withholding the names of the other attendees, the Commissioner now requires the DoH to disclose the names of the remaining attendees at the meeting.

Right of appeal

44. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jill Hulley
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